MICHIGAN STATE MEDICAL SOCIETY

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OFFICE OF THE PRESIDENT 2000-2001 Billy Ben Baumann, MD

April 3, 2001

The Honorable John D. Dingell
U. S. House of Representatives
2328 Rayburn
Washington, DC 20515

Dear Congressman Dingell:

On behalf of the 14,000 physician and student members of the Michigan State Medical Society (MSMS), I thank you for your support in helping to pass a meaningful Patient Protection Act, HR 526 and S. 283.

Last session, the House of Representatives passed the Norwood-Dingell bill by a vote of 275-151, with 68 Republican House Members voting for final passage. In the Senate, many people worked hard to reach an acceptable bipartisan compromise, but the Conference Committee reached an impasse. This year, President Bush has outlined his principles for a meaningful Patients' Bill of Rights, many of which correspond closely with our own. We believe all sides can reach an acceptable, bipartisan compromise.

MSMS recognizes that strong bipartisan support exists for many patient protections. There is a consensus, for instance, that "medical necessity" determinations and other decisions involving medical judgment must be made by physicians (MDs/DOs), not health plan bureaucrats. Additionally, nearly everyone agrees that all patients must be guaranteed access to a properly qualified independent external appeals entity that would review benefit denials involving medical judgment and whose decisions would be binding on the plans.

Virtually all sides also agree that meaningful patient protection legislation must include provisions ensuring that patients will have adequate choice and access to care, including the opportunity to choose, at their own added expense, a point of service option to go outside a closed physician network. Further, women must be permitted to obtain gynecological/pregnancy-related care from an ob/gyn, and children need to have access to pediatricians without having to obtain a referral. Patients who reasonably and genuinely believe that they are suffering an emergency medical condition must also be able to go to the nearest emergency room without fearing that their health plan will deny them coverage. Most people also concur that health plans should be prohibited from inserting gag clauses in their contracts with physicians or implementing gag practices through plan policies. These clauses and practices strike at the heart of the patient-physician relationship, seeking to prevent physicians from discussing with their patients plan or treatment options or disclosing financial incentives that may affect the patient's treatment. We commend President Bush for his commitment to these issues and his assurance that he would support legislation that would "cover all Americans."

In recent discussions about patient protection legislation, a few other issues have been raised repeatedly. Allow us to set the record straight about our willingness to support appropriate solutions to these apparent problems. MSMS is strongly committed to legislation that would:

- Respect states' rights to govern the healthcare of their citizens
- Shield employers from frivolous lawsuits
- Not open the courts to a wide array of new lawsuits

Respect State Laws
MSMS supports allowing states to certify that their patient protections meet the federal standard. In the McCain-Edwards *Bipartisan Patient Protection Act of 2001, S.* 283/ Ganske-Dingell, H.R. 526, a state could simply certify that its insurance laws were "substantially equivalent" to the new federal standards. HHS would then have 90 days to review the certification and the state law, and if HHS failed to complete the review, the state's laws would automatically be approved. The state would also have significant latitude to pass legislation more protective of its citizens, according to its citizens' needs.

We also believe that any Patients' Bill of Rights legislation should retain appropriate federal ERISA oversight, allowing federal courts to retain jurisdiction over disputes that involve benefit decisions. Consistent with the historic role of states in regulating medical practice, state courts should retain their jurisdiction over cases that directly relate to medical judgment. This position would codify the emerging consensus of many courts over the past five years – disputes over the quality of medical care should remain with state courts.

In a letter to Senator Nickles dated March 3, 2000, the Judicial Conference of the United States, led by Chief Justice Rehnquist, specifically stated "federal courts are intended to be courts of limited jurisdiction" and "state courts should be the primary forum for any personal injury suits arising from the denial of medical care."

President Bush has stated that we should "make sure that the federal government law doesn't override what we did in our state." We believe that all sides can agree on the importance of respecting the legitimate and historic authority of states to regulate medicine and reach agreement on these important issues.

Employers Protected
Patients' rights legislation must also include language that protects employers. We believe that **only** employers who actually make final medical decisions should be held liable if they harm patients. We stand behind language in S. 283/H.R. 526 that would expressly state that employers or other plan sponsors could not be sued unless they *directly participate in an individual claim decision.* This standard would ensure that only those who **directly participated** in making a negligent medical decision that harms an individual patient could be the subject of a possible lawsuit. As such, employers will not have to be concerned about being subject to liability for exercising "employer discretion" when selecting health plans or performing other "employer" functions. The principles

outlined by President Bush echoed MSMS's position in that **only** employers "who retain responsibility for and make final medical decisions" should be held accountable. Again, we are close to resolution.

No Wide Array of New Lawsuits

MSMS strongly supports making internal and external review processes available to patients, as well as a requirement that patients must exhaust all administrative remedies prior to seeking court intervention. Under S. 283/H.R. 526, only if it would be futile for the patient to complete the review process (for instance, if the patient has died or suffered a serious injury that could not be remedied by the external review process) would the patient or patient's estate be able to seek an immediate court remedy. In fact, this futility exception would be significantly narrower than the exceptions to the exhaustion requirement in the Texas law. Notwithstanding such a provision, it is important that any party – including health plans – have the ability to require that the parties still complete the internal and external review process.

Texas's accountability provisions have been in place since 1997. Despite the insurance industry's dire predictions, we have not seen a dramatic increase in the number of uninsured, nor employers dropping coverage, nor dramatic cost increases. In fact, the uninsured rate in Texas has decreased, employers have not been dropping coverage, and Texas' premium increases have been consistent with, and in some case lower than, premium increases in states with substantially weaker patients' rights laws.

Passage of meaningful federal patient protections is long overdue. The experience in Texas and other states refutes the wild claims made by insurance companies. The principles outlined by President Bush have narrowed the debate. We look forward to working with the Administration and Congress to promptly provide all Americans with protections they deserve.

Please do not hesitate to contact us regarding this and other important health policy issues.

Sincerely,

Billy Ben Baumann, MD

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President

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